STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SHAW,

Plaintiff-Counter-Defendant-Appellee/Cross-Appellant,

v

HARTLAND COFFEE BEANERY, L.L.C.,

Defendant-Counter-Plaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
January 16, 2007

No. 266545
Livingston Circuit Court
LC No. 05-021183-CK

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

In this action to confirm an arbitration award in plaintiff Kevin Shaw's favor, defendant Hartland Coffee Beanery, L.L.C. (Hartland), appeals as of right an order (1) granting summary disposition under MCR 2.116(C)(8) and (C)(10) to Shaw, and (2) dismissing Hartland's counter-complaint and cross-motion for summary disposition. Shaw cross-appeals from the same order. In Hartland's appeal, we affirm. In Shaw's cross-appeal, we vacate the order and remand.

I.

This action is closely related to a prior decision of this Court: *Coffee Beanery, Ltd v Albert*, unpublished per curiam opinion of the Court Appeals, issued May 16, 2006 (Docket No. 259022). In that case, a corporate franchisor, Coffee Beanery, Ltd, sought to recover franchise fees and payment for equipment from Hartland and its principals. Hartland was established by Shaw, Michael Yurick, and William Albert. Albert and Yurick later claimed that they had no intention to establish a franchise and that Shaw deceived them into signing the franchise agreement. Albert and Yurick also challenged Shaw's representations that he was owed money from the partnership for equipment that he purchased for the coffee shop with funds obtained from his 401(k) plan and a second mortgage on his home. For context, the facts in *Coffee Beanery* are as follows:

> Taking the facts in the light most favorable to defendants, this case arose when defendants' partner, Kevin Shaw, enticed the individual defendants to join him in a franchised coffeehouse venture. Defendant Yurick was developing the site of the new coffeehouse when Shaw approached him and explained that the coffeehouse would not be able to lease the space because an investor withdrew,

unless Yurick would like to replace the withdrawn investor. Shaw asserted that he had a longstanding business relationship with plaintiff, the franchisor. He also explained that his parents were high-ranking executives in plaintiff's corporation, that he personally worked for plaintiff as Vice President of Franchise Sales, and that he successfully ran a franchise through plaintiff. On the basis of business pro formas (which projected sales, income, labor costs, and other statistics for a new franchise), defendant Yurick decided that the investment was a better alternative than losing rent, and even encouraged his friend, defendant Albert, to join the partnership. At Shaw's suggestion, Yurick presented a check for $25,000 in franchise fees.

Shortly afterward, the three men signed a partnership agreement and registered defendant Hartland with the state. One month after that, Shaw presented a franchise agreement in the parking lot of the construction site that would become the franchised coffeehouse. Shaw explained that it was a franchise agreement that required all their signatures, but otherwise indicated that their signatures were a formality. He encouraged them to backdate a document indicating that they received various disclosure documents. He provided the disclosure documents, but then retained all the signed documents for presentation to plaintiff. He promised to provide copies the next day, but did not.

The business did not go as portrayed. Shaw did not fulfill his promise to obtain independent financing, so Yurick extended Hartland a loan through his development company. Five months after the individual defendants signed the franchise agreement, and a week before the coffeehouse opened, Yurick finally received copies of the documents he signed. He expressed dissatisfaction with several of the contracts terms, but continued to work toward a successful grand opening. Shaw did not train the staff or manage the coffeehouse's opening as defendants expected, taking vacations and leaving the individual defendants and their spouses to fend for themselves. Shaw also gave the manager a vacation on the weekend of the opening, and did not adequately cover her responsibilities as promised. Within a week, allegations of Shaw's sexually harassing behavior towards a coffeehouse employee surfaced, and defendants bought him out of the partnership.

Although several issues of compliance arose and expectations were dashed, the parties attempted, at first, to resolve their difficulties and move forward. However, plaintiff and Shaw simultaneously pressed for payment on several pieces of equipment that Shaw said he had already personally paid for and delivered, but for which defendants never paid. At this point, defendants began asserting that the entire contract was void, and they withheld payment on the equipment until they received evidence of the amounts owed and to whom they were owed. Plaintiff brought suit for payment and a declaration that the contract was valid and enforceable. Defendants answered with counter-claims and cross-allegations of fraud. Shaw briefly entered the suit [as a third-party defendant], but he asserted an arbitration clause and was dismissed. Plaintiff eventually dropped its claim for equipment, but added a claim for royalties when defendants stopped

> paying them. The trial court [agreed with defendants' arguments that Shaw acted as a dual agent but] essentially rejected defendants' assertions of fraud and statutory violations, and it held that defendants were liable for royalties under the contract.

In *Coffee Beanery*, Hartland, Albert, and Yurick sought damages and rescission of the franchise agreement, raising, *inter alia*, claims of common law fraud, violations of the Michigan Franchise Investment Law (MFIL), MCL 445.1501 *et seq*.,[1] and claims of vicarious liability against Coffee Beanery for Shaw's individual breaches of his fiduciary duty to the partnership. This Court affirmed the grant of summary disposition to Coffee Beanery, rejecting the claims of Hartland, Albert, and Yurick. This Court also affirmed the case evaluation sanctions against Hartland, Albert, and Yurick.

The case at bar concerns Shaw's arbitration demand, under an April 15, 2001 arbitration agreement, seeking over $67,579.50 for restaurant equipment purchased for the benefit of Hartland, but not paid for by Hartland. Shaw filed a claim against Yurick and Albert to recover the $67,597.50. Yurick, Albert, and Hartland filed counterclaims and third-party claims not relevant here. This case went to arbitration. The arbitrator rendered an award in February 2004, in which he found that the equipment was in fact installed and utilized in the parties' business, which was formed pursuant to an April 15, 2001 partnership agreement. The arbitrator found that Shaw was owed the $67,579.50 for his purchase of the equipment on behalf of the enterprise, but not by Yurick and Albert. The arbitrator determined Shaw was not entitled to any award against Yurick and Albert, but Shaw had not filed a claim against Hartland, nor sought to amend his claim against Yurick and Albert to include a claim against Hartland.

Subsequently, Shaw initiated an arbitration demand against Hartland seeking the $67,579.50 for the equipment. Shaw filed a motion for summary judgment, arguing that a hearing was unnecessary given the findings in the February 2004 arbitration award that Hartland was liable for the $67,579.50. The arbitrator agreed:

> [I]n as much as the Commercial Arbitration Rules of the American Arbitration Association do not contain any mandatory joinder-of-claims provisions, Shaw was free to commence a second arbitration proceeding, naming Hartland as a Respondent and seeking recovery of the $67,579.50 owed to him by Hartland. This is precisely what he did. Under these unique circumstances, there is no need to presently adjudicate issues already adjudicated in the earlier arbitration proceeding involving the same parties (i.e. Shaw and Hartland) and the same facts. Therefore, Shaw's motion of Summary Judgment against Hartland is

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[1] The MFIL imposes notice, disclosure, and substantive requirements on contracts or agreements that meet the definition of franchise, including the requirement that a franchisor make certain mandatory disclosures at least ten days before receiving any money from or entering a contract with a prospective franchisor. See, e.g., MCL 445.1505, MCL 445.1507a, MCL 445.1508, and MCL 445.1527. The MFIL also contains a provision forbidding persons from making material misrepresentations or employing deceptive practices to sell a franchise. MCL 445.1505.

> granted with respect to Shaw's $67,579.50 claim for monies due and owing for the restaurant equipment.

In the arbitration, Shaw also requested summary judgment of Hartland's complaint against Shaw, asserting that Hartland's claims were previously litigated in the previous circuit court action. Thus, Shaw argued Hartland was barred from pursuing those same claims in the second arbitration proceedings on res judicata and collateral estoppel grounds. In response, Hartland argued that the "same parties" requirement had not been satisfied, as the trial court's grant of summary disposition to Coffee Beanery in the previous circuit court action did not pertain to any claim against Shaw. Hartland's counter-complaint was filed solely against Coffee Beanery, which was not a party to Shaw's second arbitration action. Hartland also argued that because the circuit court action had been resolved by a grant of summary disposition, the "decision on the merits" requirement had not been met.

The arbitrator disagreed with each of Hartland's contentions, concluding that the same parties requirement was satisfied

> because Shaw is alleged by Hartland, both in its First Amended Counter-Complaint filed in Circuit Court and its Complaint against Kevin Shaw filed in this arbitration, to have been an officer and agent of Coffee Beanery, Ltd and because the alleged wrongdoing pled in both the First Amended Counter Complaint and the Complaint [a]gainst Kevin Shaw was, by and large, actions undertaken by Shaw in his capacity as an agent of Coffee Beanery, Ltd, there is a substantial identity of interests between Coffee Beanery, Ltd and Shaw to satisfy the requirement of the res judicata doctrine that both actions involve the same party or their privies. [Emphases in original.]

The arbitrator also concluded that the decision on the merits requirement had been satisfied. Citing *ABB Paint Finishing, Inc v National Union Fire Ins Co*, 223 Mich App 559; 567 NW2d 456 (1997), and *Rinke v Automotive Molding Co*, 226 Mich App 432; 573 NW2d 344 (1997), the arbitrator concluded that summary disposition is a decision on the merits. With regard to the third prong of res judicata, whether the matter in the second case was or could have been resolved in the first, the arbitrator reviewed each of Hartland's counter-claims raised in the current arbitration action and compared them with the claims raised in the previous circuit action. Of Hartland's nine counterclaims raised in the second arbitration action—count I (fraud), count II (violation of consumer protection act), count III (express contractual indemnity), count IV (breach of contract), count V (contribution or indemnity); count VI (exemplary damages), count VII (negligent misrepresentation); count VIII (rescission); and count IX (breach of fiduciary duty)—the arbitrator concluded counts I, II and III were or could have been raised in the circuit court action. Thus, the arbitrator determined that the arbitration hearing would encompass counts III (express contractual indemnity), IV (breach of contract), V (contribution or indemnity), VI (exemplary damages), and IX (breach of fiduciary duty).

After two hearings in December 2004, the arbitrator in the second arbitration rendered an award on January 5, 2005, determining, without elaboration, that Hartland's claims against Shaw "are hereby denied in their entirety." Accordingly, the arbitrator awarded Shaw damages of $67,579.50, plus interest of $10,988.62, for a total award of $78,568.12. On January 12, 2005, Shaw filed a circuit court action to confirm the arbitration award under MCR 3.602. On January

14, 2005, Hartland sent a letter to the arbitrator "object[ing] to the process and award," and requesting that the award be vacated and a new arbitration conducted with a new arbitrator. Subsequently, Hartland filed an answer to Shaw's action to confirm the arbitration award, affirmative defenses, and a countercomplaint principally alleging fraud in both arbitration proceedings by knowingly submitting false documentary evidence and testimony.

Shaw filed a motion for summary disposition and for sanctions, arguing that Hartland failed to comply with the time requirement for vacating an arbitration award under MCR 3.602. Hartland then filed a first amended countercomplaint, adding a claim to declare void or voidable the arbitration awards, as well as additional affirmative defenses. Plaintiff then filed a second motion for summary disposition and for interest, costs, attorney fees, and sanctions, attaching both arbitration awards. In response, Hartland argued that the law and facts did not support the award; that MCR 3.602 was inapplicable when the parties proceeded with common law arbitration; and, alternatively, if MCR 3.602 did apply, the trial court should find excusable neglect given Hartland's efforts to vacate the award directly with the American Arbitration Association (AAA). Hartland argued that the trial court should grant summary disposition in its favor and attached 28 exhibits pertaining to evidence submitted to the arbitrator.

At a hearing on September 6, 2005, the trial court heard arguments regarding Shaw's position that Hartland's request to vacate the award was untimely as it was not filed within 21 days of the arbitration award. On September 27, 2005, the trial court issued its opinion, concluding that that the arbitration was statutory arbitration. Accordingly, the time provisions for vacating an arbitration award under MCR 3.206 applied, and Hartland's February 1, 2005 countercomplaint was untimely for that purpose. The trial court also concluded Hartland was not entitled to an order vacating the award based on fraud or corruption when Hartland based its arguments on incidents occurring at the February 2004 and December 2004 arbitration hearings, since Hartland knew or should have known of the alleged fraud by December 2004 at the latest. Similarly, the trial court concluded that to the extent that Hartland's countercomplaint could be deemed an application to modify or correct the award, it was also untimely because it was not filed within 21 days of the arbitration award. Furthermore, the trial court concluded Hartland's January 14, 2005 letter to the arbitrator requesting that the arbitration award be vacated did not satisfy the time requirements of MCR 3.206 because the court rule only allowed filing an application to vacate with the court. The trial court agreed with Hartland that the court nonetheless had the discretionary authority to dispense with the timing requirements of MCR 3.602. However, the trial court declined to find excusable neglect or to exercise that discretion:

> This lawsuit and the disputes between these particular parties ha[ve] been going on it would seem endlessly. Certainly the parties were well educated in the arbitration procedure since they've been involved in it more that one time. In fact this lawsuit, or at least in this relationship, more than one time. So the Court declines to allow the time requirements to be set aside, and I will, pursuant to the rule, confirm the arbitrator's award. So ordered.

Finally, the trial court denied Hartland's motion for summary disposition.[2] On October 25, 2005, the trial court entered an order providing that "the arbitration award in the amount of $67,579.50 plus interest of $10,988.62 for a total of $78,568.12 in favor of [Shaw] and against [Hartland] is confirmed . . ." However, the order only provides for a judgment of $67,579.50 plus statutory interest.

On November 15, 2005, Shaw filed a motion from relief from order or reconsideration, contending that neither party received a copy of the trial court's October 25, 2005 order and that it was only upon an inquiry to the court that he learned that an order had been entered. Accordingly, Shaw requested that the trial court enter an amended order providing for a judgment for the total amount of the arbitration together with interest from the date of filing the complaint and costs. At a hearing, the trial court agreed that mathematical errors could ordinarily be corrected; however, the trial court expressed concern that because Hartland's claim of appeal had already been filed, it lacked jurisdiction to modify the order when the issue concerned the propriety of affirming the entire arbitration award rather than a challenge to the amount of the award. In the trial court's opinion, no harm occurred in waiting to see if this Court affirmed the confirmation of the arbitration award, particularly where the trial court could correct the order at a later date. After Hartland responded that Shaw never presented the issue in two months, never filed a bill for taxable costs, and that Shaw had filed a cross-appeal on this very issue, which clearly invoked the jurisdiction of this Court, the trial court denied Shaw's motion. Hartland now appeals, and Shaw cross-appeals.

II.

"It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award 'draws its essence' from the contract.'" *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002) (citations omitted).

A trial court's grant of summary disposition is reviewed de novo. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 59; 631 NW2d 686 (2001). A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

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[2] It is unclear whether MCR 2.116(C)(8) or MCR 2.116(C)(10) formed the basis for the trial court's ruling. Because the trial court reviewed, at a minimum, the arbitrator's awards and November 24, 2004 order, we analyze the issue as having been granted pursuant to MCR 2.116(C)(10). See *Mino v Clio School Dist*, 255 Mich App 60, 63; 661 NW2d 586 (2003).

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Such documentary evidence "shall only be considered to the extent that the content or substance would be admissible as evidence . . . ." MCR 2.116(G)(6).

This Court also reviews de novo the interpretation and application of a statute or court rule. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

III.

A.

Hartland contends the trial court improperly relied on the arbitration agreement to conclude that the proceedings constituted statutory arbitration. We disagree.

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 128; 596 NW2d 208 (1999). The purpose of arbitration is to avoid prolonged litigation, and its effect is to narrow a party's right to litigation. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1988); *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987). Arbitration will be enforced to defeat an otherwise valid claim. *NuVision, supra* at 684.

Unlike common-law arbitration, statutory arbitration is irrevocable without the consent of both parties. See MCL 600.5011. Where an agreement to arbitrate is not in conformity with statutory requirements, it is a common-law arbitration agreement. *Whitaker v Seth E Giem & Assoc, Inc*, 85 Mich App 511, 513; 271 NW2d 296 (1978).

Section 10.3 of the parties' partnership agreement governs arbitration proceedings and provides in relevant part:

> The partners agree that, except as otherwise provided in this agreement, any dispute arising out of this Agreement, or the partnership business, which cannot be resolved by mediation, shall be arbitrated under the terms of this clause.
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> * * *
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> The arbitrator shall hold a hearing on the dispute within seven (7) days after the reply of the partner(s). Each partner shall be entitled to present *whatever oral or written statement he or she wishes and may present witnesses. No partner may be represented by a lawyer or any third party*.
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> * * *

> *The arbitration decision shall be conclusive and binding on the partners and shall be set forth in such a way that a formal judgment can be entered in the court having jurisdiction over the dispute if either party so desires.* [Emphasis added.]

Pursuant to the plain terms of the parties' agreement, Hartland's claims fail. The parties agreed to arbitrate their claims, and further agreed that the arbitration decision shall be conclusive and binding on the partners and that "a formal judgment can be entered in the court having jurisdiction over the dispute if either party so desires." It is well settled in Michigan that where an arbitration agreement provides that judgment may be entered on the arbitration award, it falls within the definition of statutory arbitration and is therefore governed by MCL 600.5001 *et seq*. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); *Dohanyos v Detrex Corp* (*After Remand*), 217 Mich App 171, 174; 550 NW2d 608 (1996).

Hartland nonetheless argues that statutory arbitration did not occur because no attorneys were present, contrary to MCR 3.602(G), and that the rules of evidence were not followed, contrary to MCL 600.5021. Again, we disagree.

MCL 600.5021 provides: "The arbitration shall be conducted in accordance with the rules of the supreme court." MCR 3.602(G) provides: "A party has the right to be represented by an attorney at a proceeding or hearing under this rule. A waiver of the right before the proceeding or hearing is ineffective." Hartland has not established that the award could not be confirmed pursuant to MCR 3.602. Arbitrators derive their authority from the parties' contract and arbitration agreement and are bound to act within those terms. *Gordon Sel-Way*, *supra* at 496. Moreover, procedural matters, including a determination of whether and to what extent the rules of evidence will be followed, are left to the arbitrator and are not judicially reviewable. *Bay Co Building Authority v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984).

Here, the parties' arbitration agreement expressly provided that no attorneys would be present during the arbitration proceedings, and the parties expressly placed no limitation on the type of evidence to be submitted in the hearing. In addition, the presence, or lack thereof, of an attorney or a party is not dispositive to the question whether the arbitration proceedings are invalid. For example, pursuant to MCL 600.5011, an arbitrator has the right to proceed to hear and determine any matter submitted to him even when a party to the dispute neglects to appear for the hearing if the party neglecting to appear was given due notice of the hearing.

However, even assuming that the absence of attorneys constituted a mistake of law, Hartland has not demonstrated that the award should be vacated. To establish that an award should be vacated, there "must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Detroit Auto Inter-Ins Exchange v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

Here, Hartland has not provided any evidence or argument that the award would have been different had attorneys been present. A review of the arbitration proceedings demonstrates that the parties competently presented evidence, accurately stated their arguments, and posed appropriate objections. Based on our review of the record, the absence of attorneys was not an error of law that was material or substantial enough to justify vacating the award, given the informal nature of arbitration proceedings in general, the plain terms of the parties' agreement,

and the parties' demonstrated abilities to present their theories of the case. The trial court properly confirmed the award.

B.

Hartland next argues that if statutory arbitration did take place, there was excusable neglect on its part in not filing its counterclaim within 21 days of the January 5, 2005 arbitration award. We disagree.

MCR 3.602(J)(1) provides:

> (1) On application of a party, the court shall vacate an award if:
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> (a) the award was procured by corruption, fraud, or other undue means;
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> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
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> (c) the arbitrator exceeded his or her powers; or
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> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.
>
> The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

"An application to vacate an award *must* be made within 21 days after delivery of a copy of the award to the applicant, except that if it is predicated on corruption, fraud, or other undue means, it must be made within 21 days after the grounds are known or should have been known." MCR 3.602(J)(2) (emphasis added). Hartland did not file an application to vacate the award pursuant to MCR 3.602. Rather, Hartland filed a February 1, 2005 countercomplaint and later filed a February 22, 2005 first-amended countercomplaint, adding a claim to "Declare Void or Voidable the Arbitrations or Awards." Because Hartland never requested that the award be vacated, its countercomplaint and first-amended countercomplaint do not constitute an application to vacate. Rather, Hartland's filings should be characterized as objections[3] to Shaw's action to confirm the award as it was not in the form of a motion. "An *application* to the court for an order in a pending action *must* be by motion." MCR 2.119(A)(1) (emphasis added). However, even

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[3] MCR 2.108(B) governs the time for filing motions in response to a pleading, and provides in relevant part:

> A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed

assuming Hartland's countercomplaint and first-amended countercomplaint could be considered as an application to vacate, correct, or modify the award, Hartland's claim nonetheless fails as Hartland failed to file within 21 days of the arbitrator's January 5, 2005 arbitration award. MCR 3.602.

Hartland also argues that, despite its failure to comply with the time requirements of MCR 3.602, the trial court erred in not finding its omission as "excusable neglect" because it filed a timely countercomplaint pursuant to MCR 2.108. We disagree. Because MCR 3.602 specifically governs the vacation of an arbitration award, MCR 2.108, which governs pleading requirements generally, is not the applicable rule. MCR 1.103 ("Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules"); see *Brucker v McKinlay Transp*, 454 Mich 8, 18; 557 NW2d 536 (1997) ("MCR 3.602 . . . controls under MCL 600.5021 . . ."). Because MCR 3.602 is the applicable rule governing arbitration, the trial court's determination that Hartland failed to comply with the time requirements of MCR 3.602 was not an abuse of discretion.

Nor did Hartland satisfy the time requirements of MCR 3.602 by sending the January 14, 2005 letter to the AAA requesting that the arbitration award be vacated. MCR 3.602 provides that "*the court* shall vacate an award . . .." Thus, the AAA is not empowered to vacate an award under MCR 3.602.

In a related claim, Hartland contends that Shaw violated AAA Rule 46 by filing the action to confirm the arbitration award in circuit court. Hartland argues that pursuant to AAA Rule 46, Shaw was required to respond to its request to the AAA. AAA Rule 46 provides:

> Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties *shall be* given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

Hartland relies on the third sentence that states the opposing party "shall be given 10 days to respond to the request." Hartland contends that a response by Shaw to the AAA was required, which would effectively suspend any action to confirm the award. Hartland misreads the rule. AAA Rule 46 only provides that the arbitrator may not act before 10 days has elapsed to allow the opposing party to respond. Nothing in AAA Rule 46 requires that the opposing party actually respond. More importantly, Shaw filed its action on January 12, 2005, *before* Hartland sent the January 14, 2005 letter to the AAA; moreover, given Hartland's failure to cite any authority for the proposition that AAA Rule 46 supplants MCR 3.602 under the facts of this case, Hartland's argument lacks merit.

C.

Hartland next argues that its motion for summary disposition on the issues of collateral estoppel and res judicata should have been granted to prohibit Shaw from obtaining a judgment

on an award from a second arbitration involving the same parties, same claims, and same evidence as the first arbitration, because Shaw had agreed that Hartland was a party in the first arbitration. We disagree.

Collateral estoppel precludes relitigation of issues actually determined by final judgment and essential to the judgment in a prior action between the parties. *Amalgamated Transit Union, Local 1564 v Southeastern Michigan Transp Auth*, 437 Mich 441, 451; 473 NW2d 249 (1991). In order for collateral estoppel to apply, the issue must be identical to that determined in the prior action. *Id*. This doctrine is strictly applied in that "the issues [in both cases] must be identical, and not merely similar . . . ." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002) (citations omitted). Moreover, "[c]ollateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Id*. at 343. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

The issue in the first arbitration concerned Shaw's action to recover from Albert and Yurick amounts paid for the restaurant equipment. The issue in the second arbitration concerned Shaw's action to recover from Hartland the amounts paid for the restaurant equipment. Because the issues in the two proceedings were not identical, Hartland has not established that it is entitled to appellate relief on the basis of collateral estoppel. *Keywell, supra.*

Res judicata "bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been resolved in the first." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 213; 699 NW2d 707 (2005). This Court applies the doctrine of res judicata broadly, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

There is no dispute that Shaw failed to raise his claim against Hartland in the first arbitration proceeding, that Shaw's claims arise from the same transaction, and that the prior arbitration was decided on the merits. However, given the fact that the AAA rules do not contain mandatory joinder of claims provisions and given the absence of any reference to collateral estoppel or res judicata in the January 5, 2005 award, no error is apparent on the face of the award to preclude the trial court's confirmation of the award.

D.

Hartland next argues that a genuine issue of material fact exists regarding whether Shaw committed fraud in the arbitrations by claiming he paid for the equipment. We disagree.

Generally, a fraud is perpetrated on a court when some material fact is concealed from the court or some material misrepresentation is made to the court. *Matley v Matley* (*On Remand*), 242 Mich App 100, 101; 617 NW2d 718 (2000). Hartland contends fraud occurred in the arbitration because (1) the second arbitration lacked findings, (2) Shaw presented inconsistent evidence, and (3) the evidence presented overwhelmingly favored Hartland.

Hartland's claims do not establish fraud. Rather, Hartland essentially challenges the weight given to Shaw's evidence. However, a party to an arbitration award may not proceed in circuit court with a complaint for declaratory relief for the purpose of relitigating the same issues decided by arbitration. *Florence Cement Co, supra* at 461. Further, to the extent that Hartland challenges the lack of findings in the January 5, 2005 arbitration award, it is well established that verbatim record need not be made of private arbitration proceedings, and no findings of fact or conclusions of law are required. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558; 682 NW2d 542 (2004). An arbitrator's findings of fact are not reviewable, and it is only the kind of legal error which is evident without scrutiny of intermediate mental indicia which remains reviewable; and if an asserted error is as capable of attribution to fact finding as it is to legal error, the award should be upheld. *Id*. Accordingly, the trial court properly confirmed the award.

E.

Hartland next argues that if Shaw did pay for the equipment, the trial court erred in failing to give Hartland a set-off of $13,000 on the equipment, because it was established that $13,000 of the franchise fee was applied towards the equipment. We disagree. Hartland's claims that the arbitrator erred in his factual findings, i.e., that he ignored evidence that Hartland paid $13,000 toward the equipment, are beyond the scope of judicial review of an arbitration award. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999).

F.

Hartland next argues that the trial court erred by not considering whether the arbitrator exceeded his authority, manifestly disregarded the law, issued awards against the great weight of the evidence, violated the code of ethics for arbitrators in commercial disputes, and was biased. Again, we disagree.

Hartland makes a cursory argument that the arbitrator refused to enforce discovery orders, and failed to abide by the trial court order directing all third-party claims be arbitrated. Hartland may not merely announce its position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may it give issues cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

In any event, Hartland has not demonstrated that the arbitrator exceeded his authority by acting in contravention of controlling principles of law. *Dohanyos, supra* at 176. "[I]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable . . . ." *Gavin, supra* at 429. The arbitrator's factual findings are not reviewable by this Court, and no legal error is evident on the face of the award. Accordingly, we reject Hartland's claim that the arbitrator made an erroneous factual conclusion in its November 24, 2004 order. Specifically, Hartland challenges the arbitrator's finding that he had previously ruled in the February 27, 2004 order that Hartland owed money for the equipment. According to Hartland, no such finding is in the February 27, 2004 order, and the arbitrator's erroneous statement is further evidence of willful wrongdoing and bias. We disagree. A review of the arbitrator's February 27, 2004 order demonstrates that the arbitrator did indeed find, albeit

indirectly, that Hartland was the proper party from whom Shaw should seek to recover the $67,579.50:

> The arbitrator finds that Shaw, in fact, was owed the sum of $67,579.50 for his purchase of the equipment on behalf of the enterprise, but not by Yurick and Albert. Accordingly, Shaw is awarded 0 on his claim against Respondents Yurick and Albert. Shaw did not file a claim against Hartland Coffee Beanery LLC, nor did he seek to amend his claim against Yurick and Albert to include a claim against Hartland Coffee Beanery, LLC.

Hartland also argues that the arbitrator violated AAA Rule 46. Hartland contends the arbitrator improperly modified the February 27, 2004 order to award interest to Shaw in the January 5, 2005 order. AAA Rule 46 provides:

> Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

Hartland has not established a violation of AAA Rule 46. No award was given to Shaw in the February 27, 2004 order; thus, the arbitrator did not redetermine the merits of that order.

Next, Hartland argues that, contrary to AAA Rule 43(d)(i), the arbitrator unreasonably awarded an arbitrary interest amount based on an arbitrary date. AAA Rule 43(d)(i) provides:

> (d) The award of the arbitrator(s) may include:
>
> (i) interest at such rate and from such date as the arbitrator(s) may deem appropriate . . . .

Here, the arbitrator awarded Shaw damages of $67,579.50 and interest at 5 percent per annum from October 1, 2001 to December 31, 2004, for a total award (damages and interest) of $78,568.12. Contrary to Hartland's argument, the award was proper given that the parties' arbitration agreement did not preclude an award of interest. *Gordon Sel-Way*, *supra* at 498 (a lawful interest award will be upheld absent a provision expressly precluding authority to award interest as an element of damages). Because nothing on the face of the award demonstrates that October 1, 2001, is an inappropriate date for interest to begin to accrue and no legal error is apparent on the face of the award, Hartland has not established a valid basis for relief.

Hartland argues that the award is not well-reasoned, contrary to AAA Rule 42, as the parties cannot determine the basis for the arbitrator's choice of October 1, 2001, as the date interest begins accruing. Hartland misreads the rule. AAA Rule 42 provides:

> (b) The arbitrator *need not render a reasoned award unless the parties request such an award* in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate. [Emphasis added.]

Here, no provision in the parties' arbitration agreement requires that the arbitrator render a reasoned award. The rule plainly provides that a reasoned award must be requested and having failed to do so, Hartland's claim fails.

Next, Hartland argues that the arbitrator demonstrated partiality. We disagree. This Court recently observed that the statutory provision concerning the bias of arbitrators contains language nearly identical to the language used in the court rule dealing with the vacation of arbitration awards. *Bayati v Bayati*, 264 Mich App 595, 601; 691 NW2d 812 (2004). Under the court rule, the court may not overturn an arbitration award on the basis of the arbitrator's bias, unless the evidence of partiality or bias is certain and direct, not remote, uncertain or speculative. *Id*.

Hartland contends that the arbitrator was biased given the arbitrator's adverse rulings, the arbitrator's disregard of the law and rules of evidence, and the arbitrator's disregard of Hartland's evidence. But adverse rulings are not a sufficient basis to find bias:

> . . . .[T]he court rule does not require that the arbitrators give equal credence to all testimony. Indeed, the arbitrators must remain free to reject any testimony or arguments that they find unpersuasive . . . .[T]here may have been a multitude of reasons supporting the neutral arbitrator's decision. The neutral arbitrator may have found plaintiff's testimony lacking in credibility. Absent certain and direct evidence of partiality, we cannot conclude that there was a showing sufficient to vacate the arbitration award. [*Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988).]

Belen's reasoning is applicable. Because Hartland has not demonstrated bias that is certain and direct, not remote, uncertain or speculative, the trial court properly confirmed the award.

Hartland next claims that the trial court failed to consider its argument that the arbitrator violated several provisions of the Code of Ethics for Arbitrator in Commercial Disputes (Code of Ethics). We disagree. The Preamble to the Code of Ethics provides

> Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. *It does not establish new or additional grounds for judicial review of arbitration awards.*

Accordingly, Michigan's standard for limited judicial review of arbitration awards remains unaffected. Because, on its face, the arbitration award fails to support a determination that an ethical violation occurred, the trial court properly confirmed the award.[4]

G.

Hartland next argues that the trial court erred by not considering whether Shaw breached fiduciary duties as a member of Hartland and as a dual agent. We disagree.

Hartland's argument, that the arbitrator and trial court failed to consider its arguments that Shaw breached his fiduciary duties, is not supported by the record given that the arbitrator, in his January 5, 2005 award, rejected defendant's claims in "their entirety." More importantly, the transcript of the arbitration hearing reflects that Hartland presented its theory and evidence. The degree of consideration given Hartland's evidence is not a matter for judicial review. *Belen, supra.* Because there is no indication on the face of the award that the arbitrator failed to consider Hartland's breach of fiduciary duty claim, the trial court properly confirmed the award.

H.

Hartland next argues that the trial judge exhibited actual bias because he failed to consider the merits of this case separately from the prior action. Again, we disagree.

A party who alleges bias or prejudice on the part of a trial judge "must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Id.* at 496.

Hartland cites several statements of the trial judge in its brief on appeal to support its claim that the he failed to consider the merits of the instant case separate from the previous circuit court action. The trial judge's comments reference his frustration with the ongoing nature of the parties' dispute and their inability to reach a resolution despite encouragement. However, the trial judge's statements of frustration or references to the parties' previous action do not establish judicial bias:

> . . .[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.

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[4] To the extent that Hartland contends that the trial court and arbitrator failed to consider Shaw's violations of the MFIL, this Court's opinion *Coffee Beanery, Ltd* is dispositive of the MFIL claims.

> . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. [*Cain, supra* at 496 (citation omitted).]

Viewing the entire record in context, the trial judge demonstrated the ability to "make fair judgment." For example, at the hearing held on September 6, 2005, the trial judge heard arguments regarding Shaw's argument that Hartland's request to vacate the award was untimely as it was not filed within 21 days of the arbitration award. Rather than accepting Shaw's arguments unquestioningly, the trial judge took the matter under advisement. In addition, the trial judge was able to render a fair judgment in deciding Hartland's motion to compel production of Shaw's tax records. Although the trial judge denied the motion, he advised Hartland to send Shaw interrogatories to acquire the information. Notably, the record also demonstrates that the trial judge did not grant Shaw's request for sanctions. Based on the entire record, Hartland has failed to overcome the presumption of impartiality.

I.

On cross-appeal, Shaw argues that the trial court erred by not entering judgment in the amount of the arbitration award. A trial court's determination on a motion to enforce, vacate, or modify an arbitration award is reviewed de novo. *Tokar v Estate of Tokar*, 258 Mich App 350, 352-353; 671 NW2d 139 (2003). Shaw contends that the trial court's October 25, 2005 order contains a clerical error because the judgment is for an amount that is less than the arbitration award. We agree.

The trial court stated on the record its intent to confirm the arbitrator's award. Under statutory arbitration, a trial court may only: (1) confirm an arbitration award; (2) vacate the award if obtained through fraud, duress, or other undue means; or (3) modify or correct errors *that are apparent on the face of the award*. *Florence Cement Co*, *supra* at 460, citing MCR 3.602(I), (J), and (K); *Gordon Sel-Way, supra* at 495. As previously discussed, because no errors are apparent on the face of the award, the trial court was not empowered to enter a judgment for an amount less than the arbitration award. MCR 3.602(L) ("The court *shall* render judgment giving effect to the award as corrected, confirmed, or modified") (emphasis added). Accordingly, a computational or clerical error occurred. This conclusion is consistent with the trial court's willingness to correct the order but for the fact that the jurisdiction of this Court had been invoked upon Hartland's claim of appeal and Shaw's cross-appeal. Accordingly, we remand for entry of a judgment consistent with the arbitration award. See MCR 7.216(A)(7); *Central Cartage Co, supra* at 535-536 (remanding case for correction of judgment to accurately reflect trial court's decision).

J.

Shaw next argues that the trial court erred by not awarding him prejudgment interest. We agree. *Holloway Constr Co v Oakland Co Bd of Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996), addressed this issue:

> The decision whether to award preaward, prejudgment interest as an element of damages is reserved as a matter of the arbitrator's discretion. Because preaward damage claims including interest are deemed, in the absence of a contrary agreement, to have been submitted to arbitration, and the arbitrators here did not award interest, we will not step in and mandate interest for the preaward period. However, consistent with *Old Orchard* [*by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 454 NW2d 73 (1990)], postaward, prejudgment interest and postjudgment interest under § 6013 are statutorily required.

Accordingly, Shaw is entitled to interest from the date of the award, January 5, 2005, forward. MCL 438.7; MCL 600.6013. We remand for entry of a judgment including prejudgment interest.

K.

Finally, Shaw argues that the trial court erred by not awarding him his taxable costs. This Court reviews a trial court's ruling on a motion for costs for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

Costs are allowed to a prevailing party unless prohibited by statute or court rule or unless the court directs otherwise, "for *reasons stated in writing and filed in the action*." MCR 2.625(A) (emphasis added). The trial court's lack of explanation for not awarding Shaw, the prevailing party, his requested costs in the October 25, 2005, order contravenes the principle that while "[a] trial court is not required to justify awarding costs to a prevailing party . . the court must justify [in writing] the failure to award costs." *Blue Cross & Blue Shield v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997) (citation omitted). On remand, the trial court shall justify in writing its denial of costs to Shaw.

Accordingly, on the principal appeal, we affirm. On the cross-appeal, we vacate the order appealed and remand for entry of an order or judgment consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder